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LANCER INSURANCE COMPANY

8 UNITED STATES DISTRICT COURT

9 DISTRICT OF NEVADA

10
11 LANCER INSURANCE COMPANY, a
12 corporation,

CASE NO.: 2:11-cv-01755-KJD-PAL

13 Plaintiff,

14 vs.

15 CLS NEVADA, LLC dba CLS
16 TRANSPORTATION LAS VEGAS;
17 CARMEN VITO; CHRIS STONE and
PREFERRED TRANSPORTATION
SELF-INSURED GROUP,

18 Defendants.

19 **PLAINTIFF'S EX PARTE MOTION TO ENLARGE TIME TO SERVE AND**
20 **APPLICATION TO SERVE DEFENDANT BY PUBLICATION**

21 COMES NOW, Plaintiff LANCER INSURANCE COMPANY, by and through its
22 attorneys of record of the law firm of McCormick, Barstow, Sheppard, Wayte, & Carruth and
23 hereby submits this *Ex Parte* Motion to Enlarge Time to Serve and Application to Serve
24 Defendant Chris Stone by Publication.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND STATEMENT OF FACTS

This is a declaratory relief action arising out of an altercation that occurred at the premises of CLS Transportation between two of the company's drivers. The Complaint was filed October 31, 2011. (Dkt. #1). A summons was issued to all of the above-named Defendants on the same day. (Dkt. #3). Service was completed against Defendant Carmen Vito on February 16, 2012 with the Acceptance of Service Form filed on February 23, 2012. (Dkt. #5). Defendant Preferred Transportation was served on February 15, 2012 with the Certificate of Service filed on February 23, 2012. (Dkt. #6). Plaintiff, Lancer Insurance Company, is in the process of completing service against CLS Transportation through its registered agent.

However, after numerous diligent attempts to effectuate service on Defendant Chris Stone, Plaintiff has been unable to do so. Plaintiff has utilized online resources to attempt to find Mr. Stone. (Exhibit A at ¶ 4). Plaintiff has hired a process server to complete service. (Exhibit A at ¶ 5 and Exhibit B). The process server has made eight visits to the last known address of Mr. Stone over a period of a week to no avail.¹ (Exhibit B). Consequently, Plaintiff requests an extension of time to complete service and permission to serve Mr. Stone through publication.

II. ARGUMENT

A. Extending the 120-Day Service Period.

Federal Rule of Civil Procedure 4(m) mandates that a defendant must be served within 120 days after a complaint is filed. *Id.* Rule 4(m) also states that if service is not timely made, the court "must dismiss the action without prejudice against that defendant or order that service be made within a specified time....If the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period." *Id.* Generally, a showing of good cause requires more than simple inadvertence, mistake of counsel, or ignorance of the Rules of Civil Procedure. *See, e.g., Martin v. Longbeach*, 246 F.3d 674 (9th Cir. 2000); *McGuckin v. Smith*, 974 F.2d 1050 (9th Cir.1992) (overruled on other grounds by *WMX Technologies, Inc. v. Miller*,

¹ It should be noted that the process server has observed lights on inside the residence but no one has answered the door. This could be indicative of attempts to evade service. (Exhibit B).

1 104 F.3d 1133 (9th Cir.1997)). “At a minimum, good cause means excusable neglect. A plaintiff
 2 may also be required to show the following: (a) the party to be served personally received actual
 3 notice of the lawsuit; (b) the defendant would suffer no prejudice; and (c) plaintiff would be
 4 severely prejudiced if his complaint were dismissed.” Martin, 246 F.3d at 674.

5 In this case, Plaintiff has made a good faith attempt to effectuate service upon Mr. Stone
 6 and Plaintiff’s inability to serve him has been beyond Plaintiff’s control. Plaintiff has hired a
 7 process server to serve Mr. Stone but has been unable to complete personal service after repeated
 8 attempts at Mr. Stone’s last known address. Mr. Stone will not be prejudiced by this extension of
 9 time. Plaintiff would be prejudiced by being forced to re-file the present lawsuit. Therefore,
 10 Plaintiff requests an additional 120 days to effectuate serve through publication.

11 **B. Service by Publication.**

12 Federal Rule of Civil Procedure 4(e)(1) provides for service upon individuals who may be
 13 served “pursuant to the law of the state in which the district court is located, or in which service is
 14 effected.” Fed. R. Civ. P. 4(e)(1). Nevada Rule of Civil Procedure 4 governs service of parties
 15 under Nevada state law. Parties are required to personally serve summons and the complaint upon
 16 defendants; however, when personal service proves impossible NRCP 4(e)(1)(i), allows a party to
 17 file a motion for service by publication when the opposing party “resides out of the state, or has
 18 departed from the state, or cannot, after due diligence be found within the state, or conceals
 19 himself to avoid the service of summons.” A party seeking service by publication, must seek
 20 leave of court by filing an affidavit demonstrating its due diligence in attempting to personally
 21 serve the defendant. There are several factors Nevada courts look to when evaluating whether a
 22 party seeking service by publication has demonstrated due diligence. Nevada courts consider the
 23 number of attempts made by plaintiffs to serve the defendants at their residence and the other
 24 methods used to attempt to locate defendants. See Price v. Dunn, 787 P.2d 785, 786-87 (1990);
 25 Abreu v. Gilmer, 985 P.2d 746, 747 (1999); McNair v. Rivera, 874 P.2d 1240, 1241 (1994).

26 In Abreu, the plaintiff made three attempts to serve the defendant at his possible address
 27 and also consulted telephone company directories in trying to locate the defendant. 985 P.2d at
 28 747. Based upon those efforts, the court determined that the plaintiff had exercised due diligence

1 in attempting service and could resort to service by publication. Id.

2 Here, Plaintiff has attempted to serve Mr. Stone at his last known address eight times.
3 Furthermore, Plaintiff has been unable to find Mr. Stone by utilizing online resources. Plaintiff's
4 process server has made a good faith effort to locate Mr. Stone without success, and as a result,
5 Plaintiff must resort to service by publication.

6 **III. CONCLUSION**

7 Based upon the foregoing, Plaintiff respectfully requests an additional 120 days to
8 complete service against Mr. Stone and permission to complete such serve by means of
9 publication.

10 Dated: February 27, 2012

McCORMICK, BARSTOW, SHEPPARD,
WAYTE & CARRUTH LLP

13 By: /s/ Wade M. Hansard

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LANCER INSURANCE COMPANY

18
19
20 IT IS SO ORDERED:

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22
23 UNITED STATES DISTRICT JUDGE

24 DATED: 2/28/12